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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 24

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., appellees

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 3571) is reported in 42 F. (2d) 281.

The first report of the Commission (R. 3346) is reported in 100 I. C. C. 110. The report of the Commission on further hearing (R. 3367) is reported in 128 I. C. C. 349. The second report of the Commission on further hearing (R. 3438) is reported in 160 I. C. C. 345.

QUESTIONS

On export, import and coastwise traffic moving through the Gulf ports from and to interior territory, much nearer [1] the Texas ports than the port of New Orleans, the rates of appellant carriers and other carriers to and from New Orleans were generally the same as, and in many instances (R. 3359, 3444) even lower than, the rates to and from the Texas ports. In respect of certain commodities, the Commission, upon findings of undue preference of New Orleans and undue prejudice to the Texas ports, entered orders, which, while permitting equalized rates where the distance to New Orleans did not exceed that to Galveston by more than 25 per cent, prescribed differentials in the New Orleans rates over the Texas ports' rates from and to interior points involving differences in distance exceeding that percentage. The ultimate question is whether the lower court erred in upholding the validity of the orders? Subordinate questions bearing on the validity of the orders are:

1. Whether the Commission's orders are void for lack of substantial evidence?

2. Whether appellant carriers, which reach the port of New Orleans with their own rails but reach the Texas ports only over the rails of connecting carriers as participants in through routes and joint

[1] Average differences in distance from representative interior points in northern Texas, 200 miles, in Oklahoma 146 miles, and in southern Kansas 143 miles. (R 3376, 3377.)

rates, could, in law, be guilty of preferring the former port to the prejudice of the latter ports?

3. Whether said orders, whose very objective is to stop the practice of equalizing rates of rival localities from territory, much nearer the one than the other, are void as being an attempt to equalize natural conditions under the guise of regulating the charges for transportation?

4. Whether the orders are void for arbitrariness because certain general orders, granting relief from the long-and-short-haul clause of section 4 of the Act, permit of greater differences in distance than 25 per cent in authorizing circuitous lines to meet the rates of short-distance lines between the same origins and destinations?

5. Whether said orders, by prescribing a relationship as between rates to New Orleans and those to Galveston that may divert traffic from the New Orleans routes, in which appellant carriers have longer hauls than in the Galveston routes, contravene the provision of section 15(4) of the Act against requiring any carrier to establish a through route not embracing all its railroad "which lies between the termini of such proposed through route"?

6. Whether the orders are void as contravening the constitutional prohibition that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another"?

THE STATUTES

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379) as amended by the Transportation Act, 1920, (41 Stat. 456) are:

> SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (24 Stat. 379, 380; U. S. C. Title 49, sec. 3(1).)
>
> SEC. 15. (1) That whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or car-

riers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. (41 Stat. 456, 484; U. S. C. Title 49, sec. 15(1)).

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except

where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest (41 Stat. 456, 485; U. S. C. Title 49, sec. 15 (4).)

SEC. 15. (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commision shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at

once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as it would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such

amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. (41 Stat. 456, 486; U. S. C. Title 49, sec. 15(7).)

SEC. 4. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a

shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *. (41 Stat. 480,; U. S. C. Title 49, Sec. 4 (1).)

Clause 5, section 9, Article I of the Constitution, is also involved, and reads as follows:

No preference shall be given by any Regulation of Commerce or Revenue to the Ports

of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

STATEMENT

Proceedings before the Commission

This controversy, as initiated before the Commission, involved commodity carload rates between the Gulf ports and points in western classification territory and Illinois on traffic in export, import or coastwise movement. The complaint, which was filed with the Commission by the Galveston Commercial Association, alleged that the Galveston rates were unreasonable and that the relationship of said rates to the rates of Houston, Texas City, Beaumont, Port Arthur, and Orange, Tex., Mobile, Ala., New Orleans, La., and its subports, was unduly prejudicial of Galveston and unduly preferential of the other ports mentioned. At the hearing the allegations of unreasonableness in the Galveston rates and of undue preference of the other Texas ports [2] in their rate relationship to Galveston were withdrawn. The other Texas ports intervened and asked for the same relief that might be accorded to Galveston in its rate relationship with New Orleans and Mobile. The issue as heard,

[2] Houston is 48 miles north of Galveston and Texas City, Beaumont, Port Arthur, and Orange, Tex., are 10, 76, 96, and 98 miles, respectively, east of Galveston. On the other hand New Orleans and Mobile are 355 and 496 miles, respectively, east of Galveston. (R. 3348.)

therefore, was one of prejudice against Galveston and the other Texas ports, and of preference of New Orleans and Mobile. (R. 3348.)

Interests at the port of New Orleans filed interventions opposing the complaint, and numerous other interventions were filed by shippers and commercial organizations, some in support of, and some in opposition to the complaint. (R. 3351.) The Atchison, Topeka & Santa Fe Ry Co., International Great Northern Railroad Company, and the Missouri-Kansas-Texas Railroad Company of Texas (hereinafter called the Santa Fe, the I. G. N., and M.-K.-T. of Texas, respectively), whose lines serve the Southwest and reach to Galveston, support the complaint. On the other hand, certain carriers reaching New Orleans with their own lines, notably appellants Texas & Pacific Railway Company and Louisiana Railway & Navigation System (hereinafter called the Texas & Pacific and the L. R. & N., respectively), opposed the complaint.[3] (R. 3350, 3351.)

From the points in the territory involved the distances to New Orleans were greater than to the Texas ports. But it was the practice of the carriers, generally speaking, to equalize the New Orleans rates with those to Galveston and other Texas ports taking Galveston rates. There were exceptions to this practice of equalizing rates in disre-

[3] Detailed statements of the carriers serving the respective ports and the positions taken by them in respect of the complaint, are given in the reports. (R. 3350, 3374.)

gard of the shorter hauls to the Texas ports. Notably, from most of Texas the rates on cottonseed products were lower to Galveston than to New Orleans, and that was also true of rates on grain and its products from points on the Santa Fe, the Fort Worth & Denver City Railway and the Wichita Valley Railway.[4] Indeed, complainants stated "that were it not for the lower rates to Galveston than to New Orleans on cotton and grain and their products from most of Texas, and on grain and its products from Santa Fe points in Oklahoma and Kansas, Galveston could not exist as a port." (R. 3355.) These latter rates were not complained of. (R. 3352.) Furthermore, while the rates to New Orleans and Galveston from territory nearer the latter were for the most part equalized, there were instances of rates even lower to New Orleans for much longer hauls. Referring to comparisons of average rates and distances to New Orleans with those to Galveston set forth in an appendix to its first report, the Commission said:

> Analysis of the comparisons in the appendix shows, for example, that for a difference in average distance of 278 miles in fa-

[4] About 60 per cent of the export grain passing through Galveston comes from points on the Santa Fe and other carriers from which rates are lower to Galveston than to New Orleans, leaving 40 per cent to come from points on the lines of carriers in southwestern territory from which the rates to Galveston and New Orleans are equalized. (R. 3352.) Other instances of rates recognizing the shorter haul to Galveston are given in the first report. (R. 3351.)

vor of Galveston the average rate to ship side on sacked grain and flour from points in Texas on the Texas & Pacific, the Gulf, Texas & Western, the Kansas City, Mexico & Orient, the Roscoe, Snyder & Pacific, and the Abilene & Southern is 1.1 cents less to New Orleans than to Galveston. From Oklahoma for an average difference in distance of 189 miles the rate to New Orleans is 0.5 cent on flour and 1 cent on grain less to Galveston than to New Orleans. On cottonseed cake and meal from the 80 per cent group in northeastern Texas the rate to New Orleans is 1.8 cents less than to Galveston, although the average distance favors Galveston by 203 miles. From Oklahoma the average distance favors Galveston by 189 miles, and the average rate to New Orleans is 1.7 cents less than to Galveston. On bagging the rate to Little Rock, Ark., is 12 cents higher from Galveston than from New Orleans, although the distance is only 23 miles greater. To Alexandria, La., the difference in rates on bagging is 30 cents in favor of New Orleans, while the distance favors New Orleans by only 18 miles. These illustrations are typical of many others shown of record. (R. 3359.)

The general basis of the complaint was, then, that the failure of the carriers, in establishing rates to the respective ports, to give recognition to Galveston's proximity to the interior points involved, subjected Galveston to undue prejudice and discrimi-

nation by depriving it of the natural advantages of its geographical location. And complainant contrasted this situation with the fact that from territory nearer New Orleans, the lesser service was given recognition by lower rates to New Orleans than to Galveston. (R. 3354.) Complainant did not take the position that every discrimination by way of equalized rates for unequal amounts of transportation would constitute undue preference and prejudice, but it insisted that there were limits beyond which the failure to accord rate recognition to differences in length of hauls must bring about that result within the meaning of the prohibition of section 3 against the causing of any undue preference or prejudice "in any respect whatsoever." Its suggestion in a general way was "that a differential between the two ports should be accorded for differences in distance in excess of 25 per cent." (R. 3352.)[5]

While the complaint was against all commodity carload rates between the Gulf ports and points in Western Classification territory and Illinois on traffic in export, import or coastwise movement, the Commission considered that the evidence intro-

[5] Complainant further asked that, if its prayer for differentials in favor of Galveston be denied from territory west of the Mississippi River, the present difference in rates in favor of New Orleans from territory east of the river be discontinued. It preferred, however, to have the situation corrected by a reduction in the rates to Galveston from the southwest rather than by an equalization of rates to the two ports from territory east of the river. (R. 3354.)

duced was sufficiently complete to warrant its action only in respect of rates on some 14 commodities or commodity descriptions, and for movements only from or to points in southern Kansas, Oklahoma, Texas, Arkansas, and southwestern Louisiana. (R. 3368, 3373.)[6]

Following hearings before an examiner, the filing of briefs and rendering of oral argument, the Commission, Division 2, issued its report of June 24, 1925 (R. 3346), and order of like date. (R. 165.) Thereby the Commission found that the relationship of rates complained of in respect of certain named commodities[7] and for movements from or to points in Arkansas, Texas, Oklahoma, southern Kansas, and Louisiana, west of the Mississippi, were unduly prejudicial to Galveston and unduly preferential of New Orleans. Where the distance to or from Galveston was shorter by not more than 100 miles it required only that Galveston be accorded the same rates as those enjoyed by New Orleans. For differences in distances exceeding 100 miles it prescribed certain named minimum differentials under the New Orleans rates. (R. 3361, 3362.)

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[6] There were no points in Arkansas and only a few in southwestern Louisiana, from which the differences in distance to New Orleans over Galveston were such as to include them in so-called differential territory. (R. 3377, 3418.)

[7] Some 14 commodities, of which so far as volume of movement is concerned, the more important are grain and grain products, petroleum and petroleum products, and cottonseed and peanut cake, meal, and oil. (R. 10, 3440.)

Subsequently, upon application for rehearing by numerous parties to the proceeding, the Commission reopened the case for further hearing but refused to postpone the effective date of its order. The defendant railroads filed and published schedules of proposed rates to comply with the order, but upon protests of numerous parties, including the complainant in the Commission proceeding, filed pursuant to section 15 (7), the paragraph of the Act which provides for suspension and investigation of proposed new rates, the Commission suspended the proposed schedules and assigned the Investigation & Suspension proceedings thereby instituted for joint hearing with the further hearing granted in the main case. (R. 3372.)

Following further extensive hearings, at which additional evidence was introduced, briefs were filed and oral argument had, the Commission rendered its report of June 29, 1927 (R. 3367), and entered its orders of like date in each of the proceedings so consolidated for hearing as aforesaid. The report modified the Commission's previous findings in the following particulars:

> 1. It included the other Texas ports along with Galveston in the finding of undue prejudice.
>
> 2. Instead of the 100-mile basis prescribed in the original report, it permitted parity of rates where the short line distance to New Orleans does not exceed that to Galveston by more than 25 per cent.

3. It exempted rates from or to points on the lines of the Texas & Pacific and the L. R. & N.

4. It exempted rates on petroleum and petroleum products altogether.

5. It still further narrowed the territory in southern Kansas as to which its findings of undue prejudice in grain rates applied.

6. It reduced the amounts of the prescribed differentials on some of the principal commodities.

7. It added to the commodity rates covered by its previous findings rates on bagging, cotton-bale ties, and buckles to points in Oklahoma.

The Commission's order (R. 76) in the title case prescribed rates to or from Galveston and the other Texas ports taking the same rates, not exceeding those maintained to or from New Orleans, where the short line distance[8] to New Orleans exceeds that to Galveston by not more than 25 per cent, that is, for such difference in distance it permitted the New Orleans rates to be the same as rates to the Texas ports. For differences in distances exceeding 25 per cent it prescribed certain named minimum differentials under the rates maintained to New Orleans.[9]

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[8] "In determining distances to or from the respective ports of Galveston and New Orleans the shortest routes over which carload traffic can be moved without transfer of lading shall be used." (R. 3419.)

[9] The Commission entered separate orders in the Investigation and Suspension proceedings cancelling the proposed schedule of rates. (R. 85, 86.)

In respect to the substitution of the 25 per cent, in lieu of the 100-mile basis for differences in distance as to which rates to New Orleans were allowed to be the same as rates to the Texas ports, the report reads (R. 3414):

> New Orleans protestants contend that if differentials are to be established the 100-mile basis prescribed in the original report should not be followed. They take the position that such a difference in distance is less objectionable for the shorter distances, but that for the longer distances the mileage limit of equalized territory should be substantially greater. We believe that there is merit in this contention and that a percentage difference in distance is preferable to a fixed mileage difference for all distances.

The reason given by the Commission for exempting from its order rates from or to points on the Texas & Pacific and the L. R. & N., was that it could not hold that those carriers participated in the causing of the undue preference and prejudice because they did not have a controlling voice in the level of the rates to the Texas ports as well as in the level of rates to New Orleans. (R. 3406.) The carriers in question reach with their own lines only the Louisiana ports, but, as will hereinafter be seen, they were parties to through routes and joint rates to and from the Texas ports. (R. 3452.)

The Commission described in its report the approximate eastern boundary line of the territory

from which the prescribed differentials were to apply. (R. 3418.) Said differential territory is also shown in a map introduced at the final hearings. (Exh. B–1, Volume of Special Exhibits.)

By schedules, filed and published by the carriers, rates carrying out the rate relationship as prescribed became effective Decembr 12, 1927. (R. 3441.)

Thereafter, upon petitions filed by complainant, by certain carriers and by various interveners, the proceeding was reopened "with the object of determining whether traffic from and to points on the lines of the Texas & Pacific and the Louisiana Railway & Navgiation System should continue to be exempted from the finding of undue prejudice made with respect to other defendants, and also whether traffic from and to points on the Weatherford, Mineral Wells & Northwestern, Denison & Pacific Suburban, Cisco & Northeastern, Abilene & Southern, and Pecos Valley Southern, short-line connections and alleged subsidiaries of the Texas & Pacific, should not also be exempted from the finding of undue prejudice." (R. 3442.)

Contemporaneously there were heard Docket No. 20685 and fourth-section application No. 13271, the rate situations in both of which arose from the exemption of the Texas & Pacific and the L. R. & N. from the finding of undue prejudice in the previous report. In No. 20685 complainant corporations,

engaged in the business of roasting coffee at Waco, Texas, alleged that the rate on green coffee, in carloads, from New Orleans to Waco is unreasonable, unduly prejudicial to them, and unduly preferential of their competitors at Dallas and Fort Worth. By the fourth-section application authority was sought to establish rates on vegetable cakes, meal, oils, and foots, in carloads, from points in Texas on the Texas & Pacific and L. R. & N. of Texas, and on grain and grain products, in carloads, from points in Texas on the Texas & Pacific to New Orleans, without observing the long-and-short haul provision [11] of the fourth section of the Act. (R. 3442.)

Further, in connection with the exemption of the Texas & Pacific and the L. R. & N. from the Commission's order of June 25, 1927, it should be mentioned that subsequently certain rates of those carriers, theretofore equalized, were established on a lower level than the rates from the same stations

[11] This provision of section 4 forbids carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance," except after obtaining Commission authority. The authority was sought from the Commission to enable the Texas & Pacific and the L. R. & N. to equalize their rates, for example, from Dallas to New Orleans with the rates from Dallas to Houston while at the same time continuing to charge higher rates from intermediate points to New Orleans. (R. 3444, 3445.)

to Galveston. This was done to equalize the New Orleans rates with those maintained to Houston. The latter port takes the same rates as other Texas ports from most of southwestern territory, but on certain commodities its rates from many points in Texas are lower than those to Galveston. (R. 3443, 3445.) Moreover, in equalizing rates, for example, from Dallas to New Orleans with those to Houston, the Texas & Pacific was confronted with the necessity of maintaining the Dallas rate as a maximum from points intermediate between Dallas and New Orleans in order to avoid violations of the fourth section prohibition against charging more for a shorter than a longer haul over the same line or route; and that resulted in rates to New Orleans in some instances even lower than those to Houston from these points (R. 3445),[12] so that, at the time of the final hearing the relative situation with respect to rates on those commodities was more unfavorable to Galveston and Houston than at any time since the proceeding was instituted.

Following further hearings and the presentation of argument, orally and in briefs, the Commission rendered its report of December 23, 1929 (R. 3438), and entered its orders of like date in the main case

[12] Said points on the Texas & Pacific, intermediate between Dallas and New Orleans, were more distant from Houston than was Dallas and by reason thereof took higher rates to Houston than the Dallas rates.

(R. 87), in said Docket No. 20685 (R. 93) and in the matter of said Fourth Section application.[13]

In its final report the Commission reversed its decision that the Texas & Pacific and L. R. & N. could not be held guilty of undue prejudice against the Texas ports as to traffic from stations on their line because they had no controlling voice in the level of the rates to the Texas ports. Accordingly, its ultimate action in the title case included traffic from stations on the Texas & Pacific and the L. R. & N. in its findings of discrimination against the Texas ports and in its order for removal thereof. The Commission also held that the short-line connections of the Texas & Pacific, above mentioned, should not be exempted from said findings and order. (R. 87; 3456.)

In No. 20685, the rates on green coffee from New Orleans to Waco were found unduly prejudicial to complainants at Waco and unduly preferential of their competitors at Dallas and Fort Worth to the extent that they exceeded rates maintained on the same commodity from New Orleans to Dallas and Fort Worth. (R. 3456.) The defendant carriers were ordered to cease and desist from charging rates to Waco exceeding the rates maintained to Dallas and Fort Worth. (R. 93.)

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[13] The Fourth Section application was denied. (R. 3456.)

Proceedings in the District Court

February 11, 1930, appellant Texas & Pacific filed its bill to enjoin the Commission's orders of June 24, 1925, of June 29, 1927 (except in so far as it exempts the Texas & Pacific and the L. R. & N.), of December 23, 1929, in Docket No. 12798, and of December 23, 1929, in Docket No. 20685, (R. 3 to 94). March 7, 1930, appellant L. R. & N. filed its bill for the same relief. (R. 95 to 135) April 2, 1930, the lower court ordered that the cases so instituted be consolidated and heard together. (R. 202.) May 1 and 2, 1930, the consolidated cases were argued and submitted as on final hearing on the application for permanent injunction. (R. 3572, 3582.) June 16, 1930, final decree was entered dismissing the bills. (R. 3582.)

SUMMARY OF ARGUMENT

1. Equal rates charged on traffic to rival ports from territory substantially nearer the one than the other cause preference and prejudice just as do unequal rates for like service, and the resulting injury may be far reaching. Unless unrestricted "port equalization" is to be regarded as a principle of regulation, altogether displacing the transportation standard of costs and values of the service in regulating rail rates to and from the ports on traffic in foreign and coastwise movement, thereby denying to other ports their natural advantages of location, it cannot be applied as a

principle of regulation to take from a particular port its natural advantage of proximity to tributary interior territory.

The causing of undue preference and prejudice is not justified in law either by the fact that the preferential rates are induced by carrier competition or by the fact that, while low, they are still regarded as compensatory. These are elements entering into the administrative determination. They do not have the effect of removing from the administrative field the determination as to whether a rate relationship causes undue preference and undue prejudice.

2. The Commission's finding that the carriers' practice of charging the same (or lower) rates to New Orleans as to the Texas ports on traffic in export, import, or coastwise movement from and to territory much nearer the latter caused undue preference and prejudice is supported by a very full record. Numerous exhibits of domestic rates (not made under stress of carrier competition) showed uniformly higher levels to New Orleans than to the Texas ports from common origins involved. Transportation conditions were shown and found to be substantially the same throughout the territory. Exhibits of average operating costs and of other operating statistics showed that it cost at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans as it did over the Santa Fe and M. K. T. to the Texas ports. With

the cost and value of a mile of transportation substantially the same, there is little room for dispute that the same (or lower) rates to New Orleans as to the Texas ports for hauls ranging upward from 25 per cent longer gives a preference to the former. Furthermore there was evidence and testimony that the preferential rate structure had checked the flow of traffic to the Texas ports from this naturally tributary territory and retarded port development. (R. 3378, 3390.) In fact all elements readily conceivable as bearing in any way on the feature of injury resulting from the preferential rate structures were placed before the Commission and were thoroughly summarized and weighed.

3. Appellants, the Texas & Pacific and the L. R. & N., were just as much parties to the discrimination between New Orleans and the Texas ports as if they served all ports with their own lines. They reached the preferred port of New Orleans with their own lines and were parties to through routes and joint rates to the prejudiced Texas ports. "Localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them." *St. Louis, S. W. Ry.* v. *United States*, 245 U. S. 136, 144. All carriers necessary for carrying out the order for removal of the discrimination, whether by raising the rates to New Orleans or by lowering the rates to the Texas ports, were before the Commission, and "wherever discrimination is, in fact, practiced, an order to

remove it may issue; and the order may extend to every carrier who participates in inflicting the injury." *Chicago, I. & L. Ry.* v. *U. S.*, 270 U. S. 287, 293. Moreover, while appellants had not sole control over the rates to the Texas ports, they were in a position, acting alone, to remove the discrimination by raising their rates to New Orleans. *U. S.* v. *Ill. Cent. R. R.*, 263 U. S. 515, 521.

4. It is alleged that the Commission's action constitutes an invasion of the industrial field in an attempt to equalize natural and economic conditions under the guise of regulating transportation. It is also alleged, as heretofore shown, that it is based on considerations too narrowly confined to the transportation measure, in that it disregards the fact that the preferentially low rates to New Orleans were induced by carrier competition.

The orders operate to secure just and reasonable rate recognition of the relative amounts of transportation service to the respective ports. New Orleans is left free to compete for traffic in the territory involved under properly related rates and, in doing so, to use all advantages possessed by it, natural or acquired. All that is taken from New Orleans is the artificial advantage of a patently improperly related rate structure. That the Commission has given painstaking consideration to appellants' evidence is shown by its reports. That it has not treated every transportation preference as unjust and undue (*Import Rate Case*, 162 U. S.

197, 219) is shown, among other things, by the fact that the orders permit of parity of rates from a broad zone nearer the Texas ports than New Orleans.

5. The instant orders are not shown to be arbitrary by the fact that certain general orders, granting relief from the prohibition of Section 4 of the Act against charging more for a longer than for a shorter distance over the same route, permit of greater differences in distance than 25 per cent in authorizing circuitous lines to meet the rates of short-distance lines between the same origins and destinations. The Commission's general 4th Section circuity limitations can not be regarded as its standards for removing undue preference specifically shown to exist under Section 3. The carriers are the only necessary parties to proceedings under the 4th Section, and intermediate communities, or others, are still free to make complaint of undue preference under Section 3. *U. S.* v. *Merch. etc. Assn.*, 242 U. S. 178, 188. Moreover, determinations in prior proceedings, even though adversary and even though involving like issues, are not relevant to show invalidity of an order entered in a later proceeding. *Virginian Ry.* v. *United States*, 272 U. S. 658.

6. The Commission's orders, by prescribing a relationship as between rates to New Orleans and those to Galveston that may divert traffic from the New Orleans routes, in which appellant carriers

have longer hauls than in the Galveston routes, do not contravene the provision of Section 15 (4 of the Act against requiring any carrier to establish a through route not embracing all its railroad "which lies between the termini of such proposed through route." The long haul referred to in the statute is of lines lying between the termini of the proposed through route. Neither destinations in foreign countries nor destinations in the United States after water carrier transportation are "termini" within the meaning of that word as used in said provision of the Act. Furthermore, the Commission's orders fixing a rate relationship are not orders requiring establishment of through routes. *Virginian Ry.* v. *U. S.*, 272 U. S. 658. The restriction in Section 15 (4) upon the Commission's authority to establish through routes was not intended by Congress to operate as a restriction upon the Commission's power to pass on rates. Compare *A. T. & S. F. Ry.* v. *U. S.*, 279 U. S. 768, 776.

7. While regulation of railroad rates under the commerce clause of the Constitution may affect the ports of one state more than those of another, that is not the giving of preference within the meaning of the clause of the Constitution that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." *Armour Packing Co.* v. *U. S.*, 209 U. S. 56, 80.

ARGUMENT

I. The question of undue preference and prejudice, repeatedly held to be one of fact for the Commission's determination, is not removed from the administrative field by a showing that preferentially low rates are induced by carrier competition and still yield some profit; on the contrary those elements enter into the administrative determination.

In regulating rates the Commission must, of course, give consideration to a locality's natural advantage of proximity to origin or destination territory, which, with transportation conditions substantially similar, is the same as saying that the amount of transportation performed under rates must enter into its determination. It follows that the prohibition of section 3 against the causing of any undue preference or prejudice to any persons or localities "in any respect whatsoever" is applicable in respect of inequality of service at the same rate quite as much as in respect of inequality of rates for the same service. This is, it would seem, axiomatic. And it is expressly recognized in rates graded on distance when applied territorially to remove discriminations between localities according to their distance from destinations. *Consolidated Southwestern Cases*, 123 I. C. C. 203, 404; *Georgia Comm.* v. *United States*, 283 U. S. 765; *Alabama* v. *United States*, 279 U. S. 229, 283 U. S. 776. In the *Shreveport Case*, 234 U. S. 342, 346, this Court, in giving illustrative instances of the character of the rate adjustment which was condemned, said, among other things:

> It appeared, for example, that a rate of 60 cents carried first class traffic a distance of 160 miles eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport.

In short, so long as the measure of rates based on transportation service remains one of the important guiding principles of regulation, a locality's natural advantage of proximity to territory involved must enter into the Commission's determinations. Indeed, if the prohibition in section 3 were unqualified, that is, if it forbade any preference or prejudice, instead of any undue or unreasonable preference or prejudice (*Tex. & Pac. Ry.* v. *Int. Com. Com.* (Import Rate Case), 162 U. S. 197, 219; *Nashville Ry.* v. *Tennessee,* 262 U. S. 318), it would seem that a locality could demand a rate relationship with other localities absolutely governed by the respective amounts of transportation service involved.

There are, of course, the so-called blanket territories and sometimes large city switching districts, all points within which take the same rates. The Commission has not disturbed these rate groupings except upon complaint and clear showing of injury to a shipper or locality. (R. 3414.) For all preferences are not undue. Similarly, "port-equalization" has been regarded as justifiable (*Maritime Asso.* v. *A. A. R. R.,* 95 I. C. C. 539), unless it disregards substantial differences in distance and re-

sults in injury. *Mobile Chamber of Commerce* v. *M. & O. R. R.*, 57 I. C. C. 554; *Inland Empire Shippers' League* v. *Director General*, 59 I. C. C. 321.

Such situations of inequality of transportation service at the same rates present some of the most difficult problems with which the Commission has to deal, which are well illustrated by the extended proceedings now under review, involving, as they do, many conflicting and tangled interests of shippers, of localities, and of the carriers themselves. Those problems bear on the preference and prejudice, and, therefore, are of administrative fact. *Penna. Co.* v. *United States*, 236 U. S. 351; *Nashville Ry.* v. *Tennessee*, 262 U. S. 318. Their determination can not be avoided by holding that the discrimination is justified as a matter of law, because the preferential rates to New Orleans are induced by carrier competition or because, while low, they are still regarded as compensatory. Rate and other preferences are more often than not induced by carrier competition. *Wight* v. *United States*, 167 U. S. 512, 517; *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, 523. That element may be seen as underlying most cases of discrimination, even though not urged as justification. *Warehouse Co.* v. *United States*, 283 U. S. 501. And rates may cause undue prejudice even though reasonable to the public (*Int. Com. Com.* v. *B. & O. R. R.*, 145 U. S. 263, 277), or, on the other hand, not below

operating costs. Indeed, it may be assumed that very few preferences are consciously given by a carrier which leave its compensation below costs. In short, the considerations that a preferentially low rate still yields some profit and that it is induced by carrier competition enter into an administrative determination. They do not have the contrary effect of removing the question of undue preference and prejudice from the administrative field.

Before this Court, as before the Commission, appellant carriers appear to be asserting that the facts that these preferential New Orleans rates were induced by competition and yield some margin of profit, coupled with the assumption that the rail rates to the respective ports are in essence mere factors in through rail-and-ocean rates, constitute justification even though undue prejudice or injury is shown to have resulted. (Appellant Carriers' Brief, 125.) If their position is, instead, that the Commission failed to give consideration to their showing in respect thereof, it rests upon the fact that the Commission would not accede to the proposition that such elements constituted justification for preferential rates in disregard of all else. In its second report the Commission set forth the considerations governing it in cases of this kind, and, among other things, said: "and even where injury is shown, the preference or prejudice may,

within limits, be justified by competition." (R. 3414.) In *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, this Court said, at page 525:

> * * * The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act, 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore.

As to the contention of appellant carriers that their preferential rates, while concededly depressed or subnormal (R. 3402), still yielded some margin of profit, the Commission in its first report, said: "There is no evidence upon this record tending to show that any of the present rates to New

Orleans are so low as to throw a burden upon other traffic" (R. 3353). Appellant carriers' own evidence introduced at the further hearings induced the Commission to say in its second report:

> The Texas & Pacific submitted studies to show the depletion of its revenues which would result if the prescribed differentials were established. Some interesting results can be obtained by analysis of these studies. One exhibit shows that during the period from September 1, 1924, to August 31, 1925, inclusive, 96,520 tons of petroleum for export and coastwise shipment moved to New Orleans over the Texas & Pacific from points which would be affected by the prescribed differentials for an average haul of 383 miles, total ton-miles of service 36,967,160, on which, if diverted to Galveston, this carrier figures it would have lost $206,446.51. Another exhibit submitted by this carrier shows that its average cost per ton-mile, not including proportion of taxes, for all freight traffic in 1925 was 1.059 cents and its average haul 170.88 miles. Assuming that, because of the difference in average haul, but considering that the empty return haul of this petroleum equipment is approximately 100 per cent, it cost two-thirds as much to handle this petroleum as it cost to handle all traffic, the total cost would have been $260,988.15, *or a loss, not including proportion of taxes, of $54,541.64.* Of these 96,520 tons, 38,389 originated at Texas & Pacific points in differential territory in Texas on which, if

diverted to Galveston, the Texas & Pacific would have received a haul of 31 miles and for which its division would have been $45,214.83. Assuming that it cost 3.5 times as much to handle this traffic as it cost to handle all traffic, *this carrier would still have had left out of its divisions $1,111.24.*

The aggregate revenue accruing to the Texas & Pacific in handling the 38,389 tons of petroleum originating at points on its line amounted to $140,428.88, for an average haul of 511 miles, or a gross revenue of $3.66 per ton and 7.16 mills per ton-mile. If we estimate the ton-mile cost, including 100 per cent empty-return haul, at two-thirds of the average for all traffic, which is probably more than is properly assignable to this traffic when considered as regular and not added traffic, we arrive at an average cost of 7.06 mills per ton-mile or one-tenth of a mill less than the gross revenue. Similar computations with respect to other commodities show corresponding results. These results are at best only approximations, but they serve at least to cast *considerable doubt upon the wisdom from a revenue standpoint of the unrestricted policy of equalization followed by the Texas & Pacific.* R. 3406, 3407.) (Italics ours.)

The Court's attention is also called to the further discussion of the carriers cost studies in the Commission's second report (R. 3407, 3408, 3411) and in its final report (R. 3448, 3450). The extended discussion of the Commission disposes of any

doubt that it did give consideration to appellants' traffic, revenue, and cost figures. A report, discussing in detail all evidence introduced, would have closely approximated in size the large record in this case. The weight to be given evidence is, of course, for the Commission.

While the Commission made no formal finding that the preferential rates to New Orleans were so low as to cast a burden on other traffic, it is clear from the above-quoted language that, in balancing the injury to the Texas ports against the interest of appellant carriers, it had in mind that gross traffic loss through diversion from the New Orleans routes, in which said carriers have their long hauls, did not, in view of the subnormal rates that had had to be charged to secure the traffic, afford a normal picture of net revenue loss. And corroborating this, consideration of the large differences maintained by the carriers in domestic rates from the same points to the respective ports of New Orleans and Galveston (set forth in exhibits hereinafter referred to) show that appellant carriers' interest in continuing equalized rates over their long-haul routes to New Orleans from this territory, nearer to Galveston than New Orleans by more (in many instances far more) than 25 per cent, is not measurable in terms of gross traffic, as secured by those very low rates. And, as above said, the self interest of appellant carriers is not justification in law; it is merely matter to be con-

sidered in determining whether the preference or prejudice is undue.

1. Appellants' theory that no undue preference or prejudice could result between New Orleans and Galveston from the distorted relation of rail rates to said ports because the sum of the rail rate and the ocean rate to destination would be the same through either port, rests upon faulty reasoning, even assuming the premises to be just as stated.

Another contention of appellants, which is related to the contentions just above discussed, is succinctly stated in the Commission's second report and quoted in appellant carriers' brief (p. 131), as follows:

> The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, division 2 found a similar contention to be without merit. Equalization of port rates on the basis advocated by this carrier would require consideration in every instance of port relationship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction.

Appellants' position is, in fact, that Commission is without authority to disturb the relationship of rates to the respective ports because the relationship of ocean rates from said ports is such that the sum of the rail rate and the ocean rate from a common interior origin to a common foreign, or coastwise, destination is the same regardless of whether the routing is through New Orleans or Galveston.

That appellants considered that this situation constituted justification in law for the distorted rail rate structure to the respective ports is shown by the very nature of their contention, the substance of which was that, any differential whatsoever made in the rail factor, would leave the total rail-and-ocean charge no longer the same when routed through Galveston as when routed through New Orleans. It is further shown by their supporting argument that, since the situation of equalized rail rates to the respective ports despite the great disparities in transportation service was offset by equalized steamship rates from those ports, making the sum of the rail-and-ocean rates the same regardless of which port was used, there could result no undue preference or prejudice as a matter of law. (Brief of Texas & Pacific, page 147, and brief of New Orleans Joint Bureau et al., page 45.) Thus appellants' position is, and has been, that the situation divested the Commission of authority, that is, that the relation of rail rates to the ports was con-

trolled by the relation of steamship rates maintained from those ports.

In the first place, appellants' premise that the total rail-and-ocean charges from common interior origins to common foreign destinations were the same whether the routing was through New Orleans or through Galveston is true only in so far as rail rates to the respective ports were in fact equalized. While this was the case, generally speaking, it seems that there were many instances of rates even lower to New Orleans than to Galveston in disregard of the much longer distances. (R. 3359, 3364, 3375, 3443, 3444.) In its second report the Commission, after giving a general outline of the rate situation, said:

> On the commodities on which rate differences now exist, as shown in the appendix to the original report, those differences sometimes favor New Orleans, where the distances are substantially greater than to Galveston; in other instances they favor New Orleans, where the distances are about the same as, or only slightly greater than, to Galveston, and in still other instances they favor Galveston, but generally by smaller differentials than those described in the original report. (R. 3375.)

As to these instances of rates even lower to New Orleans than to Galveston, despite distances "substantially greater than to Galveston" it would appear that there were no offsetting differentials in

steamship rates to make the totals of rail-and-ocean charges the same through both ports.

In its final report the Commission mentions certain rates from Dallas to Houston that were lower than rates to Galveston and that the Texas & Pacific had equalized its rates from Dallas to New Orleans with these lower Houston rates. There resulted higher rates from intermediate points which then had to be lowered to the level of the rate from Dallas in order to avoid violations of the fourth section of the Act (discussed more fully later). These rates, it so happened, were even lower than rates from the same points to Houston and there were, of course, no offsetting differentials in ocean rates to make the totals of rail-and-ocean charges the same through all ports involved. "Fourth section relief" to maintain the higher rates from intermediate points was applied for and denied. The fourth section contains express limitations upon the Commission's discretion to grant such relief, which may, or may not, have been the occasion for denying the application. But when and where such express statutory restrictions are involved, it is quite clear that the relationship of rates maintained by steamship companies from rival ports would not control the granting of fourth section relief.

Furthermore, even assuming that there were not the many exceptions to the equalization of rail rates to the respective ports and that, therefore, the totals

of rail-and-ocean charges were in fact the same through both ports in all instances, appellants' argument that such situation would make impossible as a matter of law undue preference and prejudice between the ports is not persuasive. As we interpret appellants' thought from their brief as a whole, it appears to be that, with the same total rail-and-ocean charge available through either port, there could be no purely rate incentive to favor the New Orleans route despite the fact that the rail factor was preferentially low for the much greater service to New Orleans. But if this reasoning is sound in respect of rates to the respective ports on traffic in foreign and coastwise movements, so likewise it would seem that, if domestic rates from origins nearby Galveston were the same to New Orleans as to Galveston, no undue preference or prejudice as between those communities could result in law because there would be no rate incentive to favor New Orleans more than Galveston. The answer in respect of both situations is that rates from origins much nearer Galveston than to New Orleans, made the same to New Orleans as to Galveston, do constitute a rate incentive to unduly prefer New Orleans. Rates giving any recognition whatsoever to the much greater service would be higher to New Orleans than to Galveston. Similarly, as with producers of commodities, the ports competitively reach out for business in territory nearer their rivals and if traffic therefrom moves on equalized

rates, instead of having to absorb a differential for substantially greater service, a rate incentive is necessarily afforded. Unless and until adopted as a general principle of regulation, appellants' theory of relating rates to the ports, can not be applied to take from a particular port its natural advantage of location. As heretofore shown, New Orleans now enjoys rates lower than the Texas ports' rates from its nearby territory. (R. 3354, 3355, 3376, 3389, Ex. A–260.) And there is no offsetting differential in ocean rates; since appellants' testimony is that ocean rates are equalized from the respective ports. This shows that the measure of transportation service still remains an important principle for relating rates to the ports, regardless of rate relationships maintained by steamship companies from rival ports. And it is also shown by decisions of the Commission. *Maritime Asso.* v. *A. A. R. R. Co.*, 95 I. C. C. 539; *Mobile Chamber of Commerce* v. *M. & O. R. R.*, 57 I. C. C. 554; *Inland Empire Shippers' League* v. *Director General*, 59 I. C. C. 321; *Tobacco From Ohio River Crossings*, 73 I. C. C. 384. To the same effect see Exhibit A–400 (R. 2307–2308). Unless that principle is stricken altogether from the law governing port relationships, thereby denying other ports their natural advantage of proximity to origin territory, it must follow that a rate relationship, which denies a particular port recognition of its natural advantage of geographic location, can, in law, cause undue preference and prejudice.

Appellants' attempt to draw an analogy between the Commission's refusal to accede to their proposed doctrine and its view prior to the decision in *Import Rate Case,* 162 U. S. 197, which, as therein stated by this Court at page 207, was "that it was shut up by the terms of the Act of Congress to consider only such 'circumstances and conditions' as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada." The court's decision made clear that the Commission was not so "shut up" in reaching its administrative determinations, but it did not lay down the doctrine that the relationship of rail rates to rival ports was controlled by the relationship of rates maintained by steamship companies from the same ports. On the contrary, what was there most emphasized was that the Commission should exercise a comprehensive and untrammelled administrative judgment.

In view of the fact that the Commission's order permits rates the same to New Orleans as to Galveston from territory 25 per cent more distant from New Orleans, and requires differentials only for differences in distance ranging upward from that percentage, that is, for the instances of marked disregard of transportation costs and of Galveston's natural advantage of location, it will not do to say that the interests of appellant carriers and their showing of the competitive situation inducing them to maintain the preferentially low rates over the routes to New Orleans, in which they have their

long hauls, did not enter very substantially into the Commission's determination.

II. The Commission's finding of undue preference and prejudice is supported by a very full record and appellants' insistence that the Commission gave too much weight to certain elements and too little to others in effect asks the court to weigh the evidence and substitute its judgment for the administrative determination of the Commission.

Because of the various interests involved in this case, the concrete situation confronting the Commission and the manner in which it was handled should be kept in the foreground. From and to points much nearer the Texas ports than New Orleans, rates to and from New Orleans were being maintained the same as, and in many instances even lower than, the rates to and from Galveston and other Texas ports taking Galveston rates. From representative interior points in the affected territory the average distances (short line) to New Orleans exceed those to Galveston to the extent shown in the following statement taken from the Commission's report on further hearing:

> From Southern Kansas to New Orleans 898 miles, to Galveston 755 miles, difference 143 miles; excluding points in equalized territory, 930 and 768 miles, respectively, difference 162 miles.
>
> From Oklahoma to New Orleans 691 miles, to Galveston 545 miles, difference 146 miles; excluding points in equalized territory, 720 and 546 miles, respectively, difference 174 miles.

> From northern Texas to New Orleans 644 miles, to Galveston 444 miles, difference 200 miles; excluding points in equalized territory, 670 and 457 miles, difference 213 miles. (R. 3376–3377.)[14]

Using interior points which figured prominently in the case for the purpose of showing some of the instances of greater differences in distance that entered into the above statement of averages, there are for example: Dallas, whose distance to New Orleans, 488 miles, exceeds that to Galveston, 291 miles, by 67 per cent; Fort Worth, whose distance to New Orleans, 520 miles, exceeds that to Galveston, 308 miles, by 68 per cent; and Waco, whose distance to New Orleans, 533 miles, exceeds that to Galveston, 233 miles, by 128 per cent. (R. 2385.)

The Commission's order prescribed rate differentials only in respect of points from which the distance to New Orleans exceeded that to Galveston by more than 25 per cent, thus permitting equalized rates from territory, involving differences in distance of 25 per cent or less.[15]

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[14] Among others see Ex. A–269, So. Kas.; Ex. A–94, Okla.; Ex. A–268, Nor. Texas.

[15] Of course, if Houston (48 miles north of Galveston) had been used as a basing point instead of Galveston for computing distance, "differential territory" would have been generally widened and territory from which rates to New Orleans were allowed to be the same as to the Texas ports would have been commensurately narrowed. (R. 3348.) Except for petroleum, which was exempted, New Orleans' big competitors among the Texas ports were Houston and Galveston.

The complaint filed with the Commission embraced rates between all points in Western Classification Territory and the Gulf ports on all commodities moving in export, import and coastwise traffic. But Commission action was necessarily limited to those rates in respect of which adequate evidence was introduced, and, as so narrowed, was confined to the rates on some 15 commodities moving from or to points in five states. Points in differential territory were almost entirely confined to parts of Texas, Oklahoma and southern Kansas. (Map, Ex. B–1.)

The undue preference and prejudice in the instant case is that the same rates charged to New Orleans were charged to the Texas ports for lesser service, or conversely stated, that the same rates charged to the Texas ports were charged to New Orleans for greater service. In its first report on further hearing the Commission said:

> No witness seriously questioned the finding first made in *Memphis-Southwestern Investigation,* 55 I. C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same.[16] The transpor-

[16] Mention of this is also made in the Commission's first report (R. 3352) and in the Examiner's proposed report leading up to the Commission's first report on further hearing, which was served on the carriers. (R. 3508.)

> tation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to. With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers. We say approximate because the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf make impossible, of course, an equality of unit cost on every commodity. Consideration must also be given to the fact that the average haul on equalized traffic is greater to New Orleans than to the Texas ports. (R. 3410.)

Competent witnesses in the instant case acceded to the findings made in the Memphis Southwestern Investigation and other cases that transportation conditions were substantially the same. (R. 295, 498, 649, 659, 933, 3089, 3129, 3274.) Appellant carriers apparently accept as generally true the finding of the Commission that transportation conditions are substantially the same throughout the territory involved. (Brief 179, 180.) They are asserting, however, as they did before the Commission, that transportation conditions on their Louisiana division are more favorable than on the rest

of their system, particularly as permitting the traffic in question to be regarded as "added" traffic (R. 980, 987) and its cost of handling to be estimated on a so-called out-of-pocket basis (R. 3410, 3449). That the Commission had before it operating figures from which it could make comparisons of relative transportation costs is shown by the following appearing in the Commission's first report on further hearing:

> The Texas carriers show that the average operating cost, freight proportion, per 1,000 gross-ton miles for the Gulf, Colorado & Santa Fe was $3.46 in 1923 and $3.02 in 1924, for the M. K. T. $3.68 for 1923 and $3.07 for 1924, for the Missouri-Kansas-Texas of Texas $4.07 for 1923 and $3.27 for 1924, and for the Texas & Pacific $4.13 for 1923 and $3.74 for 1924. It will be noted that in both years the average cost of the Texas & Pacific exceeded that of each of the other roads named. The average cost per 1,000 revenue ton-miles was also greater on the Texas & Pacific than on the other roads in 1923 and 1924, except that in 1923 the figure for the Missouri-Kansas-Texas of Texas exceeded that of the Texas & Pacific. Other exhibits making comparisons of the operations of these same roads show that for the 11 months ended November 30, 1924 and 1925, the number of gross and net tons per train on the Texas & Pacific was less than the number on the other roads; that the average cost of maintenance and operation per 1,000 gross-

> ton miles was greater on the Texas & Pacific than on the Gulf, Colorado & Santa Fe by 21.1 per cent in 1923, 21.4 per cent in 1924, and 26 per cent in 1925. These and other exhibits point to the conclusion that, differences in lengths of haul considered, and without comparing special service on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans or the other Louisiana ports as it does over the Gulf, Colorado & Santa Fe or the M. K. T. to Galveston or any of the other Texas ports. (R. 3411.)[17]

Referring to a cost study of the Texas & Pacific which was offered to show that its revenue from equalized traffic more than covered the out-of-pocket costs of the "added" service, the Commission said:

> These estimates were arrived at as follows: The Texas & Pacific handled a greater tonnage and its unit cost was greater in 1925 than in 1924; after an adjustment for the additional cost of fuel, the estimated cost of handling the additional traffic in 1925 was ascertained by dividing the excess amount of traffic handled in that year into the average excess unit cost in 1925 over that in 1924. This formula is far from convincing. If it were applied to the Gulf, Colorado &

[17] Ex's. A–376 to 382 (R. 2258–2271); Ex's. A–45 to 48 (R. 967 to 971); Ex's. A–51 to 56 (R. 1008 to 1016); Ex's. A–59 to 65 (R. 1030–1045); Ex. A–516, 520 (R. 2972, 3002); Ex's. A–68 to 75 (R. 1045–1068); Ex. A–543 (R. 3011–3017).

> Santa Fe, for example, which handled more tonnage in 1925 than in 1924 but at less unit cost, the indication would be that it handled the additional traffic in 1925 for less than nothing.

In its second report upon further hearing the Commission, after discussion of additional cost computations of the Texas & Pacific and other carriers,[18] reaffirmed its findings that, differences in haul considered but without comparing special services on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans as it does over the Santa Fe and M. K. T. to the Texas ports, and it added that "What has just been said with respect to out-of-pocket costs on the Texas & Pacific applies also to somewhat similar data offered by the Louisiana Railway & Navigation Company." (R. 3448 to 3450.)

With unit transportation costs "at least as much" to New Orleans as to Galveston, it must follow that for distances greater to New Orleans than to Galveston by from 25 to 68 per cent,[19] rates the same to

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[18] Ex's. B–84 and B–87 (R. 3260–3262): Ex. B–46 (R. 3173): Ex. B–50, 51 (R. 3184–3187): Ex. B–69 to 71 (R. 3231–3285).

[19] Sixty-eight per cent was the approximate maximum from important points on the Texas & Pacific (computed from Ex. A–420 shown at R. 2385, and from Ex. B–17, Volume of Special Exhibits), but there were instances of equalized points involved, as to which the difference in distance exceeded that percentage. (Ex. A–420, R. 2385.)

the respective ports are preferential of the one and prejudicial of the other.

There were, too, the numerous exhibits (cumulating with each hearing) comparing domestic rates to New Orleans with those to Galveston.[20] Those rates had probative value for purposes of comparison (*Chic. R. I. & Pac. Ry.* v. *United States*, 274 U. S. 29, 33, 34; *L. & N. R. R.* v. *United States*, 238 U. S. 1, 12; *Virginian Ry.* v. *United States*, 272 U. S. 658) and the marked difference in New Orleans rates over those to Galveston had probative value as showing the substantial preference of New Orleans and prejudice to Galveston resulting from the equalizing of export rates from the same origins. The fact that consideration had to be given to the distinctions between domestic traffic and foreign or coastwise traffic, and to many other elements did not deprive the exhibits of evidential value.

In short, based on the standard of transportation costs and values (*United States* v. *Ill. Cen. R. R.* 263 U. S. 515, 524), the record leaves no doubt but that the same (in some instances lower) rates to New Orleans as to Galveston, or conversely stated, the same (in some instances higher) rates to Galveston as to New Orleans from this territory much nearer Galveston than New Orleans have caused very substantial preference and prejudice.

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[20] Ex. A–420, R. 2385; Ex. B–17 (Volume of Special Exhibits); Ex. A–422, R. 2338; Ex. A–424, R. 2390; Ex. A–434, R. 2396; Ex. A–435, R. 2398.

And, as above said, unless it be accepted that in the regulation of rail rates on traffic in foreign and coastwise movement, the transportation standard should be displaced by the principle of unrestricted port equalization, thereby denying other ports their natural advantages of proximity to origin territory, it would seem that little other than the discriminatory rate structure pictured in the record is necessary to demonstrate that the preference given New Orleans must have resulted in undue prejudice and injury to Galveston.

However, all matter readily conceivable as in any way bearing on the question whether the rate structure had or had not resulted in injury to the Texas port was placed before the Commission by the adversary parties. The summarizing and weighing of the evidence, both as intended to show and as intended to refute the claim of injury resulting to the Texas ports from the discriminatory rate structure, was thoroughly done by the Commission and comprehensively set forth in its reports. That the injury to the Texas ports was of substantial and far reaching character can be quickly shown.

It is claimed that any diversion of traffic from Galveston to New Orleans is attributable to the latter's superior drawing power as a port and not to the preferential rate structure. New Orleans is, of course, entitled to compete for traffic from territory even though more than 25 per cent

nearer Galveston and, in doing so, to use its superior advantages as a port, whether natural or acquired through progressive enterprise. There is nothing in the Commission's order that denies it that right. But New Orleans is not, in addition, entitled to the artificial aid of a rate structure which checks the flow of traffic that would go to Galveston under a rate relationship that would recognize the right of each port to substantial equality of treatment. The above was mainly the principle which guided the Commission through the maze of the unusually large record of facts and statistics.

In so far as the feature of injury to the Texas ports is concerned, appellants rely chiefly on the summarization by the Commission in respect of tonnage of all kinds and from all sources passing through the gulf ports, which shows that the Texas ports have made a favorable showing as compared with Louisiana ports in the matter of such total tonnage from all sources. (R. 3380 to 3384.) But, as pointed out by the Commission, comparisons of total tonnage do not adequately reflect the injury to the Texas ports from equalization of the rates, by reason of the fact, among other things, that the Santa Fe and other carriers serving a considerable area maintain lower rates and do not follow the policy of equalizing rates in disregard of distance; and by reason of the further fact that the tonnage figures include a huge volume of

petroleum from the Mexican and Texas fields, mostly moving through the Texas ports, which commodity was exempted from the Commission's order. As to the above the Commission said:

> * * * The principal increase in the movement through the Texas ports has been in petroleum imported from Mexico. In the year ended June 30, 1924, 93 per cent of the imports through the Texas ports consisted of petroleum from Mexico, while the corresponding percentage for the Louisiana ports was only 52.[21] The large balance of the imports through the Louisiana ports, principally New Orleans, consisted of a diversified tonnage destined to a wide interior territory. Of the total exports handled through the Texas ports during that year 91 per cent consisted of petroleum, sulphur, grain and grain products and cotton.
>
> * * * Moreover a very substantial volume of the tonnage through the Texas ports and particularly Galveston, notably grain and grain products, petroleum and its products, cottonseed products and sulphur, moved and now moves at lower rates than to New Orleans. * * * (R. 3382.)

In short, a very large proportion of the whole import tonnage through the Texas ports was of the one commodity, petroleum, moving in private

[21] Only petroleum and its products move in substantial volume through Louisiana ports, other than New Orleans. The latter is the only Louisiana port that handles general cargo (R. 3374); it handles very little petroleum (R. 3383).

tankers from the Mexican fields. (R. 3378.) Of the export tonnage, 91 per cent consisted of petroleum, sulphur, grain, and cotton, and much of that was accounted for by the fact that it moved over the Santa Fe and other carriers which did recognize the shorter distances to Galveston by lower rates.

Excerpts from other findings of the Commission, bearing particularly on traffic from the territory here involved and the relationship of rates on that traffic, read as follows:

> * * * For many years, if not since its establishment, as a port, the traffic moving through Galveston, excluding Mexican crude petroleum which moves largely in private tankers, has consisted largely of export traffic, of which cotton, cottonseed products and grain and grain products have composed the major portion. Most of this traffic has moved on rates lower to Galveston than to New Orleans. * * * The belief was freely expressed by a number of complainant's witnesses experienced in the exportation of traffic through one or more Gulf ports that a complete equalization of rates on all commodities between New Orleans and the Texas ports from and to the affected territory would within a comparatively brief period have the effect of practically closing the Texas ports and diverting the traffic to the Louisiana ports, particularly New Orleans. * * * (R. 3378.)

* * * Witnesses for steamship lines serving Galveston expressed confidence that an increase in the volume and variety of general cargo through that port would do much to stimulate its steamship service. Immediately following the original decision herein there was noticeably increased activity on the part of steamship interests at Galveston, and there was in prospect additional steamship service between the Texas ports and various foreign ports, particularly in the Latin America. These activities ceased upon the reopening of this proceeding. (R. 3379.)

* * * * *

* * * Complainant states that many of the commodities which constitute what is termed general cargo for vessels are produced or consumed in the affected territory in sufficient volume to afford the Texas ports a variety of commerce sufficient to attract steamship service, but that these commodities will not move to the Texas ports in substantial quantities unless they are given the benefit of a rate differential under New Orleans. Many instances were cited by witnesses for complainant in which export business from points in the affected territory were lost to the Texas ports because of the better and more frequent steamship service at New Orleans, even though the rail haul was shorter to the Texas ports than to New Orleans, where the rate was the same. Exporters and importers testified that they would not locate

> at any of the Texas ports under an equalization of rates with New Orleans, and at least in one instance an importer abandoned a Texas port and moved to New Orleans, even though the ports were equalized, because of the superior advantages offered by the latter port. (R. 3390.)

The record contains a large amount of testimony, accompanied by documentary evidence, in support of the above statements. The Court is referred to the testimony of Witness Hershey, for 18 years General Freight Agent of the Gulf, Colorado & Santa Fe, which for the first hearing commences at page 616 of the record and for the second hearing at page 2276 of the record. Among other things, Mr. Hershey testified:

> To my mind the very existence of Galveston and the other Texas ports depends absolutely and entirely upon the result of this proceeding now before the Interstate Commerce Commission. * * *.
>
> * * * It is my belief that were it not for the fact that the grain from Texas, the cotton from Texas, and the wheat from Oklahoma points adjacent to the Santa Fe, moved to Galveston on a lesser rate than is available to New Orleans, there would not be any business at this point. In other words, it is that movement of traffic that attracts the traffic from points where the rates are the same from New Orleans and to Galveston. My belief is that if the rates on the traffic originating in Texas and Oklahoma were

> the same identical rates to New Orleans as are in effect to Galveston, within a very short period of time Galveston would be abandoned as a port and would not serve the purpose for which this Government expended a great sum of money for the purpose of development. (R. 616, 617.)

And again at the second hearing, Mr. Hershey testified

> It has been my view for many years that the continued existence of the Texas gulf ports depends completely upon their ability to secure and retain the advantage of their geographic location, and that such advantage must be reflected in the rail rates between such points and interior points, and that the territory to or from which the Texas ports should have such advantage ought to produce and consume a sufficient volume of traffic to at least form a nucleus for a ready and steady flow of tonnage through these ports in both directions.
>
> * * * It is my view that were there a complete equalization of rates to or from New Orleans as are in effect to or from Texas ports to or from points in Texas, Oklahoma, and southern Kansas, within a very brief period practically the entire export, import and coastwise business of these states will be handled through Louisiana ports, and that the investment that has been made in the Texas ports will be completely lost. * * * (P. 2276, 2277.)

Witness Garvin, General Freight Agent of the M. K. T. Railroad, among other things, said:

> I think it has even now gotten to a point where the rates are somewhat unremunerative, for instance we apply the same grain rates as to Galveston, but after we divide the revenue with our connections the revenue is very thin. * * *
>
> I think the method employed by complainants in determining the proper level of rates is the only proper way of getting at it. I do not believe you can pick out any isolated point and figure that mileage from that point to New Orleans and Galveston and say the rates from both points should be the same. I think the average distance from a group of points to Galveston versus New Orleans should be the method employed. * * * (R. 614, 615.)

Witness Booth, Traffic Manager of the International Great Northern since 1911, among other things, said:

> We do not subscribe to the principle of port equalization where the distances are substantially different, for two reasons: First, it takes away from the port or ports more favorably situated the natural advantages to which they are entitled by reason of their geographic location, and involves the application of substantially higher rates, distance considered, to the nearby port, as compared with the other port. In my judgment it is discriminatory under Section 3 of

> the Act; in the second place, it involves wasteful service and places an unnecessary burden upon the transportation system as a whole, which is contrary to that provision of the Interstate Commerce Act with respect to economy of operation. (R. 633.)

Witness Booth then went on to illustrate, by stating that average distances on the I. G. No to New Orleans were approximately 250 per cent of the distance to Galveston; that most rates to Galveston had been fixed by the Commission as reasonable rates for the distance; and that therefore the same rates as applied for the much greater distance to New Orleans involved waste. Later on in the course of his testimony, Mr. Booth said:

> For a number of years prior to July, 1918, the United Fruit Companies operated regularly into Galveston with cargoes of bananas. During a large part of the time they had about two ships. At that time, as at present, the rates were and are lower from Galveston to Texas points than they were to New Orleans. I have heard the United Fruit Company would resume its operations probably through the port of Galveston. Should the New Orleans-Texas line reduce the rate on bananas from New Orleans to Texas points to the same figures as are in effect at Galveston, I am satisfied they would not come into Galveston; there would be no reason for their coming to Galveston. They have their organization in New Orleans and they get cheaper fuel there and can do

> their business from that port on the same rate more conveniently than from Galveston.

Witness Bowe, General Freight Agent of the Trinity & Brazos Valley Railroad, endorsed generally the principle laid down in the Commission's first report (R. 2415) and, among other things, said:

> The basis for my prediction that if the equalized rates continue as they are now, in ten years Texas ports will have dried up, is because that is the way it has been going for some time.

Theretofore Mr. Bowe had said:

> Yes, sir, this principle of so-called equalization has gotten to such a stage that some lines can not afford to participate in this traffic, when you have got to divide it more than once. (R. 2416.)

Witness Thornton, Traffic Manager of the Galveston Commercial Association, pictures very graphically the "effect" which equalization has had on Galveston, and the court is respectfully referred to his testimony commencing at page 289 of the record, and exhibits therein mentioned. Among other things Mr. Thornton, after specifying the regions from which the same (or lower) rates applied to New Orleans as to Galveston, said:

> As a result Galveston has found it very difficult to compete with the port of New Orleans for much of this foreign and coast-

wise traffic that originates in the territory tributary to Galveston. Furthermore, New Orleans with the support of the Texas and Pacific has been trying for the past twelve months or more to force an equalization with Galveston at practically all other points in Texas where the equalization is now not in force. Galveston therefore finds that it is very difficult to build up any South American or Central American trade on account of the unfavorable rate adjustment to and from Galveston and the undue preference in favor of New Orleans in the rates on many commodities, and it is only with the greatest difficulty that Galveston is able to maintain a steamship service to the West Indies and Mexico on account of this undue preference in favor of New Orleans in the matter of freight rates. Take coffee for an illustration:

We have heretofore found it very difficult to compete with New Orleans in the handling of this important commodity on account of the preferred rate adjustment of New Orleans to the territory tributary to Galveston * * * However, if Galveston is given benefit of lower rates than applied from New Orleans on coffee destined to points in Texas, Oklahoma, Kansas and other western states, where the difference in distance in favor of Galveston justifies a difference in rates, and if equal rates are established from Galveston with New Orleans to points substantially equally distant, the port

of Galveston will be able to develop the importation of coffee through this port. We are not now having importation of coffee of any great magnitude. We are gradually trying to build up that trade, but we are restricted at the present time and will be until we get these rates published which we are seeking. * * *

* * * As a result of what we call these preferential rates in favor of New Orleans, Galveston has never been able to handle any export cottonseed oil to any great extent. However, if Galveston is accorded lower rates than New Orleans, commensurate with the difference in distance on cottonseed oil shipped from Texas and Oklahoma, and equal rates with New Orleans from points in Arkansas and Louisiana where the difference in distance justifies equal rates to the two ports, there is no question but that Galveston could develop an export movement of this important commodity. What has been said in respect of coffee and cottonseed oil applies with equal force to other commodities, such as petroleum, packing-house products, etc.

* * * On the other hand, we recognize that New Orleans should be given lower rates than Galveston where the difference in distance is materially in favor of the Louisiana ports. By adjusting the rates in this manner Galveston could develop a considerable import traffic, which is badly needed by the rail lines serving Galveston in order to balance the export movement through this port.

> It would also permit us to build up our foreign trade. It would enable Galveston to meet New Orleans competition on export traffic, particularly on general cargo traffic, which would also permit us to build up our foreign trade with South and Central America, Mexico, and the West Indies. It would also enable us to build up our general cargo trade with Europe. And here I might mention that as fast as we develop any import movement of any commodity through Galveston, for example, newsprint paper—we have recently developed a nice little movement of newsprint paper through Galveston—and immediately that developed the New Orleans interests with the support of the Southern Pacific and the Texas Pacific Railway tried to establish rates to points in Texas which are absolutely the same as the rate from Galveston, for the purpose of destroying our import traffic. Newsprint paper is simply mentioned for illustration purposes. It is not a question of what the paper rates are, but the custom we are up against.

Witness Torregrossa, Manager of the West Indies Service, Lykes Bros. Steamship Company, Texas Ports, testified very fully as to steamship conditions at the Texas ports. His testimony commences at page 1904 of the record. Among other things the witness said:

> Since the decision of this case last July we have given some thought to the establish-

> ment of service to Mexico, Central and South America. As to making any plans in that respect, particularly in so far as Cuba is concerned under the recent decision of the Interstate Commerce Commission, we were investigating the resumption of our Cuban service, particularly to Havana, but when the decision was postponed we simply changed our ideas on that. (R. 1906.)

Witness Herrick, Vice President of the Lone Star Steamship Company, Galveston, also testified generally as to the steamship situation at Galveston, commencing at page 1892 of the record. After stating that he was familiar with the Commission's decision in its first report, Mr. Herrick said:

> My line has considered the establishment of additional service to points following the decision in this case. Last November, after the Commission had made the decision in favor of Texas ports, we announced at the Southern Millers' Convention that we were prepared to inaugurate a service at New Mexico, Cuba and the lesser West Indies and also to South America. It is not now our purpose to do that. It depends entirely on the rate structure that might be handed down by the Commission. We don't feel that we can go into a steamship business here at the ports I mention unless we could at least have an even break on the business which we are not and cannot hope to get under the present situation. With equalized

> rates from that territory we can have an even break for the business. (R. 1894.)

Witness Hogsett, Manager of the Traffic and Transportation Department of the Houston Chamber of Commerce, gives a complete résumé as to the effect of equalized rates with New Orleans on Houston, accompanied by exhibits. His testimony commences at page 1925 of the record.

Among other witnesses testifying to the difficulties encountered by exporters and importers located at Texas ports there were: Holloman (R. 3120); Sparkes (R. 3133); Davison (R. 2080); Eargle (R. 2056); Stockton (R. 2095); Daugherty (R. 2023); Beveridge (R. 1912); Farga (R. 2018).[22]

The impossibility of determining definitely what proportion of the traffic from this territory would have gone to Galveston under properly related rates is, of course, apparent. But there was the indisputable fact that New Orleans was intensively competing for traffic from this territory, ranging upward from 25 per cent near Galveston, in which effort it was aided by the same rates as (in instances lower rates than) those to Galveston. In addition there was convincing testimony by many competent witnesses, that injury had and was resulting to the

[22]As particularly bearing on No. 20685, which, as heretofore said (p. 20), was heard together with title case, evidence as to the rate structure described and found unlawful by the Commission (R. 3446, 3456) is shown at pages 3107 to 3111 of the record, and the detriment resulting therefrom appears in testimony of witnesses Geoghagan and Boyd at pages 3053 to 3064 of the Record.

Texas ports, and there was a great amount of material bearing generally on that question. Certainly there was ample evidence upon which an administrative body could reach a determination; and, moreover, it is difficult to see how the Commission could have arrived at a different decision than it did.

1. The rate differentials named in the Commisison's order were for the purpose of removing undue prejudice, and there was ample evidence to enable the Commission to reach its determinations

Appellant, State of Louisiana, in effect asserts that the Commission in naming the differentials as between rates to New Orleans and those to the Texas ports should have proceeded under section 1 as well as under section 3 of the Act, that is, that, as a prerequisite to its naming of differentials, it must have considered (and presumably made findings) that the differentials when added to the present New Orleans rate would result in reasonable rates. In *American Express Co.* v. *Caldwell*, 244 U. S. 617, Justice Brandeis said, at page 624:

> But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates*. If in such a proceeding an unreasonable rate is uncovered and that rate made

> reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely.

In *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, 524, the rate complained of before the Commission, while found to be unduly prejudicial, was expressly found not to be unreasonable. As to this the court said:

> But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.

To the same effect, *Int. Com. Com.* v. *B. & O. R. R.*, 145 U. S., 263, 277.

That the order in the instant case was "aimed directly only at the relation of rates" is self evident since it left with the carriers whether to deduct the differentials from the Texas ports' rates or whether to add them to the New Orleans rates. It is difficult to see how the situation differs in substance from the usual case permitting of alternative methods of removing discrimination.

The outline of evidence given in the preceding chapter shows that there was ample in the record to enable a rate-making body to determine section 3 differentials. There were the exhibits comparing domestic rates to the respective ports from the same territory on these commodities and on many

other commodities. There were numerous exhibits of rates from other territories to other ports. There were cost studies, ton-mile earnings, and car-mile earnings. There were the many elements and considerations placed before the Commission, such as the distinction between foreign and domestic traffic, the capacity of the Texas ports and other matters affecting interests of carriers and shippers. As was said in *Int. Com. Com.* v. *U. P. R. R.*, 222 U. S. 541, at page 550:

> * * * Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.

And in *O'Keefe* v. *United States*, 240 U. S. 294, the opinion reads, at pages 303, 304:

> * * * Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. * * *.

III. The Commission's action was taken solely in the exercise of its power to regulate rates.

Appellants assert that the Commission's action was an attempt to extend its powers beyond its field of regulating transportation charges and to invade the field of industrial and economic conditions. Another contention of appellants, already discussed, is that the Commission confined itself

too closely to the transportation standard of cost and value of the services in disregard of the fact that the competitive situation surrounding export and import traffic was the moving cause for the preference given New Orleans. In this latter connection appellants cited *Texas & Pacific* v. *Int. Com. Comm.* (*Import Rate Case*) 162 U. S. 197, wherein the Court, among other things, said, at page 219:

> * * * The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the Act.

Included in the large record there was without doubt matter, introduced by both sides, which was not strictly relevant to the issue of undue preference and prejudice. This, however, was known to the Commission. And, furthermore, the Commission can not adjust rates by yardstick measure, blindfolded to all else, since its task does not end with the determination that a preference is being

given but continues until it has determined whether or not, and to what extent, that preference is undue. *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 322; *Penna. Co.* v. *United States,* 236 U. S. 351. This is well illustrated by the reasons inducing the Commission to exempt petroleum from its order. Appellants cite that exemption as inconsistent action. They would be right if every preference, instead of every undue preference, were prohibited. But the exemption, in fact, demonstrates the determined effort of the Commission to do justice to all concerned. Because of circumstances peculiar to the petroleum situation the rate discrimination did not cause substantial injury to the Texas ports. A readjustment of rates would have done serious hurt to other shipping interests and rail carrier interests with little, if any, benefit to the Texas ports. (R. 3395 to 3401.)

The power exercised by the Commission is not to be judged by isolated recitals but by its whole report. *Chi. R. I. & Pac. Ry.* v. *United States,* 274 U. S. 29, 32. And particularly it would seem that an attempt to regulate natural and economic conditions should not be read into isolated recitals where, as here, the Commission action or order in the case clearly is within the rate regulating field. Certainly the order can not be said to take from New Orleans its natural advantages of location. New Orleans is left with its lower rates from territory nearer to it than to Galveston. From territory up to approximately 25 per cent nearer Gal-

veston, it is left with equalized rates. The differentials prescribed from territory still nearer Galveston can not be regarded as giving more than just and reasonable recognition to the difference in cost and values of the services.

All that is taken from New Orleans is the unjust aid of equalized rates from territory very much nearer its rival port. It is still left free to compete for traffic in that territory, under a fair and just rate structure and in doing so to use all advantages which it possesses, either natural or acquired. Appellants' contention that the action of the Commission encroaches on the industrial and economic field seems mainly to rest on reasoning as follows: The equalized rates [23] from origins, nearer to Galveston, are met by equalized Ocean rates from the ports. Thus, since the through rate from common origin to common destination is the same regardless of whether a shipment moved through New Orleans or through Galveston, there could have been no purely rate incentive to give preference to the New Orleans route and, therefore, the difficulties under which Galveston labored in securing traffic from its nearby territory were due, not to the distorted rail-rate structure to the respective ports, but to the natural and acquired advantages of New Orleans and its consequent drawing power as a port.

It is, of course, true that elements other than rates affect the drawing power of a port. But, as

[23] As pointed out in Chapter I, there were rates even lower to New Orleans than Galveston from origins nearer the latter.

pointed out earlier in this brief, if appellants' reasoning is sound in respect of foreign traffic moving through rival ports, similarly it would be true that equalized domestic rates to rival communities from territory much nearer the one than the other could not, in law, be said to be a rate incentive to favor the more distant community; for it could be urged that seeming injury to the prejudiced locality was not due to the maladjustment of rates but to the fact that its rival locality had greater drawing power because of its natural and acquired advantages and progressive enterprise. The fault in this reasoning is, as also above pointed out, that equalized rates from territory much nearer one locality than another are a rate incentive in aid of any other advantages. So long as the measure of rates based on cost and values of the service remains an important guiding principle in regulation, thereby giving recognition generally to the principle that localities are entitled to their natural advantages of location, appellants' theory of regulation can not be applied to take from a particular locality its natural advantage of proximity to origin or destination territory.

IV. Plaintiffs, the Texas & Pacific and the L. R. & N., are just as much parties to the discrimination against the Texas ports as if they reached those prejudiced localities, as well as the preferred locality of New Orleans, with their own lines.

As pointed out in the preliminary statement, the Commission's order of June 29, 1927, exempted points on the lines of the Texas & Pacific and the

L. R. & N. from its requirement that differentials be established in the rates to New Orleans over the rates to the Texas ports. The Commission's final order of December 23, 1929, discontinued the exemption and required that the differentials be established from and to points on the Texas & Pacific and the L. R. & N.

The main stem of the Texas & Pacific extends from El Paso, Tex., east through Abilene and Fort Worth, to Marshall, thence southeast to New Orleans. It also has a line extending north to Denison, thence east to Texarkana, whence two lines radiate in a southerly direction and make connections with its main stem, the one at Marshall and the other at Shreveport. The main stem of the L. R. & N. of Texas extends from McKinney, Collin County, Texas (near Dallas and Fort Worth), through Greenville to Shreveport, where it connects with the L. R. & N., which latter extends southeast through Alexandrie and Baton Rouge to New Orleans.

While appellants, the Texas & Pacific and the L. R. & N., reach with their own lines only the Louisiana ports, they participate in through routes and in a full line of joint rates between the Texas ports and both the junction and local points on their lines.[24] (R. 3256, 974–975, 3228, 3452.)

[24] A substantial portion of Texas & Pacific traffic is routed to the Texas ports over the lines of Texas port roads, including the I. G. N., with which it has a traffic arrangement and operates through freight train schedules via Fort Worth

Appellants contend, however, that in order to be guilty of undue prejudice under section 3 a carrier must control the rates both to the prejudiced point and the preferred point.

1. Although the Texas & Pacific and L. R. & N. reach with their own lines only the Louisiana ports, they are effective instruments of discrimination against the Texas ports, and "localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them."

Section 3 (1) of the Act declares it to be unlawful for any common carrier to cause any undue or unreasonable preference or prejudice—

> to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever.

The court has said that the above "language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn" (The *Shreveport Case*, 234 U. S. 342, 356); "that the evil of discrimination was the principal thing aimed at" by the Act (idem); and that the purpose of Congress was "to cut up by the roots every form of discrimination, favoritism and inequality." *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467.

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and Longview. (T. & P. Witness, R. 974, 975.) The Texas & Pacific has an open route via Fort Worth and the I. G. N. as well as other carriers, "so that they can and do participate in through rates and routes from Sweetwater and other competitive points on its line in Texas, as well as its local points, to the Texas ports." (M.–K.–T. Witness, R. 3256.)

Appellants contend that the method of removing undue preference and prejudice, whether by raising the rates to the preferred locality or by lowering the rates to the prejudiced locality, must be left to the discretion of the carriers, and that, therefore, appellant carriers, the Texas & Pacific and the L. R. & N., could not, in law, be guilty of discrimination from points on their lines to the respective ports because they individually did not control the rates to the prejudiced Texas ports as well as their single-line rates to the preferred port of New Orleans.

Appellant carriers reach with their own lines the favored locality of New Orleans, and, as above shown, they are parties to through routes and joint rates to the prejudiced Texas ports. They could, therefore, acting alone, remove the discrimination by raising their single-line rates to New Orleans. Acting cooperatively with other carriers, they could remove the discrimination by lowering the rates to the Texas ports. That appellant carriers' responsibility for, and ability to remove, the violation of law are altogether sufficient to render valid an order, which necessarily deals with combinations of many carriers, can be readily pointed out.

In *St. Louis, S. W. Ry.* v. *United States*, 245 U. S. 136, there was involved a Commission order requiring, among others, the Cotton Belt, Iron Mountain, and Rock Island railroads, respectively, to establish, either through Cairo, Ill., or Memphis,

Tenn., a rate on lumber from points in the southwest to Paducah, Ky., no higher than the rate to Cairo. The Cotton Belt and Iron Mountain hauled Paducah traffic up to Cairo and there turned it over to the Illinois Central for movement to Paducah. The Rock Island's lines reach neither Cairo nor Paducah, but it participated in traffic to both destinations. All three carriers contended that the Commission's order was void because "since their rails did not reach Paducah they could not be guilty of discrimination against that point." The court, in upholding the order, said, at page 144:

> * * * They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.*

The order involved in the above case was directed against carriers, two of which, similarly as in the instant case, had their own lines and rates

to the preferred point, but not to the prejudiced point, and one of which reached with its own lines neither the preferred point nor the prejudiced point, and, therefore, was not responsible for rates to either point except as participating carrier with its connections.

United States v. *Ill. Cent. R. R.*, 263 U. S. 515, involved facts as follows: There was a large territory in Mississippi served by the Illinois Central, its branches and independent connections, from all points within which rates on lumber moving to northern markets were the same, except that from Knoxo, located near the center of the territory and on the Fernwood & Gulf, an independent connection of the Illinois Central, rates were 2 cents per 100 pounds higher. The Swift Lumber Company complained that the rates from Knoxo were unreasonable and unduly prejudicial. The Commission found that the rates were not unreasonable; but that they subjected the Swift Lumber Company to undue prejudice in view of the lower rates accorded competing points within the territory. Its order required the carriers to desist from charging rates higher from Knoxo than from the other points in the territory. The Illinois Central and the Fernwood & Gulf joined in a suit to set aside this order. The court, in upholding the Commission's order, stated and answered the carriers' contentions (here pertinent) as follows (pages 520, 521):

> First. It is contended that the order exceeds the powers of the Commission. The

argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant: that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence, that it cannot be required to cooperate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable. That, on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines and it is not in a position to remove, by its own act, the discrimination complained of. Neither proposition is sound. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced, as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue

> prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central cannot remove the discrimination without the cooperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River Crossings, the rate-breaking point.

It will have been noted that the Fernwood & Gulf was not a party to the rates from the preferred points. But, as said by the Court:

> By joining with the Illinois Central in establishing the prejudicial rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced, as if it had joined also in the lower rates to other points which are alleged to be unduly preferential.

And, too, it appears that, in order to be held guilty of discrimination, it is not even necessary that a carrier's participation with connecting carriers be by way of joint rates. A very similar situation to that just above described was involved in the Commission's order which was upheld in *Wyoming Railroad* v. *United States* (heard and decided with the *Illinois Central case, supra*), 263

U. S. 515, 527. There, too, the Wyoming Railroad, which was found guilty of discrimination against points on its line and ordered with other carriers to remove same by charging no higher rates than those maintained from the preferred points, (518) did not participate in rates from the preferred points. It was an independent connection of the Burlington Railroad and its participation in rates from the prejudiced points on its line was only by way of its local rate in combination with rates of the Burlington. But by joining in the traffic with the Burlington it became one of a "combination of connecting carriers" causing the discrimination.

It seems clear that the above decisions go much further in holding that any participation by a carrier in discrimination may be reached and removed by the Commission than is necessary in the case of appellant carriers in the instant suit, which reach with their own lines the preferred locality and which are parties to through routes and joint rates [25] to the prejudiced localities.

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[25] In *Central R. Co. of N. J.* v. *U. S.*, 257 U. S. 247, relied upon by appellants, the Commission had held certain carriers guilty of undue prejudice because they denied the creosoting-in-transit privilege on lumber to a plant located at a point on their lines, while participating in joint rates over routes that passed through the point with other carriers, which latter allowed the privilege to plants on their own lines as an item of their local tariffs. The court set aside the Commission's order. In a footnote to the *Illinois Central Case*, page 520, the court distinguished this case as follows:

"In *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, the creosoting privilege was not a part of the

In *Chicago, I. & L. Ry.* v. *U. S.*, 270 U. S. 287, the Commission had found certain steam roads which served Michigan City guilty of unjust discrimination, because while each maintained reciprocal switching service with the others, such service was denied to the South Shore, an electrically operated railroad. The Erie alone had direct physical connection with the South Shore. In upholding the Commission's order, the court said at pages 292, 293:

> * * * It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party,

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joint tariff. It was an item in the local tariff granted without the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them."

In the *Chicago, I. & L. Ry. case*, page 293, the court also distinguished the creosoting case, saying:

"* * * There is nothing to the contrary in *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. * * *"

> the intermediate carrier. * * * Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, *an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 197–9. * * *. (Italics ours.)

In the instant case appellant carriers were solely responsible for their single-line rates to the preferred port of New Orleans. Together with other carriers they participated in the rates to the prejudiced Texas ports and shared in the revenue. Acting alone they could remove the discrimination by raising their rates to New Orleans. In the alternative the discrimination could be removed by cooperative action of appellants and other carriers in lowering the rates to the Texas ports. Appellants' argument that alternative operation of the order was ineffective because they, acting alone, could not remove the discrimination by causing the rates to the Texas ports to be reduced, and the other carriers would not voluntarily join with them in such action, is not different in logic than argument that an order establishing reasonable through rates, joint or combination, is ineffective because cooperative action of participating carriers is necessary for compliance.

With all carriers before the Commission necessary to remove the discrimination, whether by raising the New Orleans rates or reducing the Texas ports' rates, it is clear that an order could issue and that it could "extend to every carrier who participates in inflicting the injury."[26]

V. The instant orders for removal of undue preference and prejudice under Section 3 are not shown to be arbitrary and void by the fact that certain general orders, granting so-called fourth section relief in connection with distance rates prescribed in several cases, permit of greater differences in distance than 25 per cent, in authorizing circuitous lines to meet the rates of direct lines between common origins and destinations.

Appellants contend that the instant orders for removal of undue preference and prejudice under Section 3 of the Act are inconsistent and arbitrary because certain general orders (R. 926, 3412, Exs. A–17 and A–101), granting so-called 4th section relief in connection with rates based on distance scales prescribed in several cases on commodities moving in the southwest, permit of greater differences in distance that 25 per cent in authorizing the same rates to be charged over indirect routes as over direct routes between common origins and destinations.

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[26] Appellant carriers' statement (Br. 95) that the Commission had for 20 years adhered to the doctrine which led it to exempt them from its earlier order is disputed by its decisions reviewed by the Court in the above cases.

Section 4 of the Act (quoted under "Statutes," *supra*) forbids the charging of more for a shorter than for a longer distance over the same line or route, unless Commission authority therefor is obtained. Where such authority has been sought by circuitous lines to enable them to share with direct lines in traffic from common origins to common destinations, it has been quite generally granted. That is, in respect of points from which two or more routes are available, carriers in indirect routes have been permitted to meet the rates of the direct route and to maintain higher rates (when resulting) from intermediate points.[27] The fourth section authorizations referred to by appellants are general in scope and are conditioned upon specified maximum circuity limitations, as follows:

> 70 per cent for short-line distances of 500 miles or less, 50 per cent for short-line dis-

[27] The section specifies express limitations and exceptions to the Commission's authority which have had to be strictly observed, to wit:

"in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence.

> tances of 1000 miles and over 500 miles, and 33⅓ per cent for short-line distances of over 1000 miles. (R. 3412.)

In the case of short-line distances of 500 miles, for instance, the above circuity limitations would permit the charging of the short-distance rate over circuitous routes longer by 350 miles. Appellants referred to this in the Commission proceeding and pointed to the fact that the differences in distance over the direct routes to New Orleans and those to Galveston from points in the affected territory are generally less than 350 miles.

Even were the considerations entering into the limitations imposed upon circuitous lines in meeting the rates of direct lines between common origins and destinations, while maintaining higher rates from intermediate points, comparable in all respects with those entering into the limitations here imposed upon carriers in equalizing rates to New Orleans with rates to the Texas ports, still "the alleged inconsistency with findings made in other proceedings" would not be relevant to show invalidity of the orders now before this court. *Virginian Ry.* v. *United States*, 272 U. S. 658, 666. Moreover, the considerations entering into the Commission's determinations in the separate proceedings are not in all respects the same. In *Class and Commodity Rates in the South*, 160 I. C. C. 685, the Commission said at page 697:

> * * * The charging of a higher rate at intermediate than at more distinct points

> on the same line or route is prohibited by section 4 of the act. We are authorized to grant relief from the provisions of that section subject to the condition that we shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. This is an express limitation upon our powers which can not lawfully be waived and the circuity limitations which we impose in connection with relief granted under section 4 are necessary to comply with the reasonably compensatory requirement of that section. * * *.

Undue prejudice may exist under section 3 even though rates involved are reasonable. (*Int. Com. Com.* v. *B. & O. R. R.*, 145 U. S 263, 277; *Am. Express Co.* v. *Caldwell*, 244 U. S. 617, 624) or reasonably compensatory.

Intermediate communities may participate in fourth section proceedings, but they are not necessary parties. In *United States* v. *Merch. Etc. Assn.*, 242 U. S. 178, this court said at page 188:

> * * * The carrier is the only necessary party to the proceeding under section 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted

> seem to them unreasonably, or unjustly discriminatory, sections 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief "but were denied the right of hearing" and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under Section 13, as they had a legal right to do. They mistook their remedy. * * *

And in *Patterson* v. *L. & N. R. R.*, 269 U. S. 1, involving that other clause of section 4 which forbids the charging of "any greater compensation as a through rate than the aggregate of the intermediate rates," the court said at pages 11 and 12:

> It is true that the due filing of such an application for relief from the aggregate-of-intermediates clause or even an order granting relief thereon, would not render legal a rate which violated some other section of the Act. See *United States* v. *Merchants, etc. Assn.*, 242 U. S. 178, 188. A through rate would be unlawful, despite such an order, if it violated section 3, because unjustly discriminatory, or if it violated section 1 because unreasonably high. * * *

It is true that, even in the absence of participation by intermediate communities in fourth-section

proceedings, the Commission represents the public and exercises its best judgment to safeguard the interests of all under the section. But its rulings as to permissible differences in length of haul contained in general orders, authorizing indirect routes to meet the charges of direct routes, do not fix, or purport to fix, the limits within which there could be no undue prejudice against intermediate points or other points.

Appellants refer to some instances of indirect routes to Galveston which are longer from the same origins than the routes to New Orleans, but which, under the fourth-section authorizations, are permitted to meet the short-distance rate to Galveston. They urge that, if carrier competition justifies indirect lines in meeting the short distance rates to Galveston while maintaining higher rates from intermediate points, so likewise carrier competition should be controlling in permitting appellant carriers to equalize rates to New Orleans with the Galveston rates. Much the same reasoning was advanced in the *Georgia Sand and Gravel Case*, 160 I. C. C. 309, 323, 324, and in briefs filed with the court on review of the case in *Georgia Public Service Commission* v. *United States*, 283 U. S. 765.

Appellants' argument assumes that, in determining whether there would result from the establishment by a circuitous line of a lower rate from a more distant point than from an intermediate

point undue prejudice to the latter, the fact that the lower charge is made because of carrier competition, that is, to meet the rate of the direct route, would be regarded as absolute justification. Doubtless the facts that the circuitous line accords the more distant point the lower rate to secure a share of the business, that such participation in the through traffic and revenue may enable it to improve its service generally and thus result in positive benefit to the intermediate point, that the lower rate accorded the more distant point has been determined (in connection with the distance scales prescribed) as reasonable for its direct route to destination and is in any event available to it over that route, and that the intermediate point's rate, though higher, is in fact its short-distance rate to the same destination, all are elements to be considered, among other things, in determining whether the circuitous line, by making the more distant points direct-route rate also available to it over the longer route and maintaining the higher rate from the intermediate point unduly prefers the former and unduly prejudices the latter. But that is not to say that carrier competition, even though coupled with the other elements mentioned, would be given controlling weight to the exclusion of all else if an intermediate community should avail itself of its remedy (*United States* v. *Merch., etc., Assn., supra*) of complaint and specific showing of undue preference and prejudice. Keeping in

mind the network of lines with which the Commission must deal, the many interests affected and the comprehensive prohibition in the Act against all forms of preference and advantage few, if any, abstract statements can be made of situations surrounding the giving of preferences which could be confidently asserted, in advance of full information, not to create undue prejudice. In so far as carrier competition alone is concerned, it is commonly the motive behind the giving of preferences (*U. S.* v. *Illinois Cent. R. R.*, 263 U. S. 515, 523, 524; *Wight* v. *United States*, 167 U. S. 512, 517) and behind other forms of discrimination. *Warehouse Co.* v. *U. S.*, 283 U. S. 501.

VI. The Commission's orders, fixing a rate relationship between the port of New Orleans and the Texas ports, are not orders requiring the establishment of through routes which "short-haul" appellant carriers in contravention of section 15 (4) of the act.

A further contention of appellants is that the Commission's orders contravene the limitation upon its authority to establish through routes which is imposed by paragraph (4) of Section 15 of the Act.

Paragraph (3) of Section 15 provides "that the Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, establish through routes, joint classifications and joint rates," etc.; and paragraph (4) reads in part:

> In establishing any such through route the Commission shall not (except as provided in

> section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: * * *

When analyzed appellants' contention appears to be that the orders contravene the above provision against requiring any carrier to join in a through route not embracing all its railroad "which lies between the termini of such proposed through route," because they prescribe a relationship as between rates to New Orleans and those to Galveston that may divert traffic from the New Orleans routes, in which appellant carriers have longer hauls than in the Galveston routes. It will be seen that the long haul referred to in the statute is of lines lying between the termini of the proposed through route. Under the language, the matter of appellant carriers' hauls in the routes from points on their lines, or from points beyond, to the terminus of New Orleans is one thing and the matter of their hauls in routes from points on their lines, or from points beyond, to the terminus of Galveston is quite another thing. The Act contains no prohibition against re-

quiring a carrier to join in a through route from an origin to one terminus, which does not embrace all its railroad that lies between that origin and a different terminus.

The provision relied upon can only be conceived of as relevant, if its language is construed to include routes from the interior origins through the respective ports of New Orleans and Galveston to common termini following the steamship transportation beyond. Appellants attempt to do this. But since, in so far as steamship carriers operating to foreign ports are concerned, the Commission has no authority to require them to join in through routes (U. S. C. title 49, sec. 1(1), (c) and sec. 6 (13)), it seems beyond dispute that the restriction upon its authority to require the establishment of through routes has no reference to through routes which would include ocean transportation to termini in foreign countries. And, in so far as steamship carriers operating in coastwise commerce are concerned, it will have been noted that the restriction (above quoted) upon the Commission's authority to establish through routes is itself qualified by the words "except where one of the carriers is a water line."

Furthermore, the Commission's orders, prescribing rate differentials as between the respective ports, is not an order requiring the establishment of through routes. *Virginian Ry.* v. *United States*, 272 U. S. 658, involved the validity of action by the

Commission, whereby it had found existing combination rates on coal unreasonable and unduly prejudical and had ordered established "rates which shall not exceed the district rates maintained on like traffic." It was asserted by the railroads that the order was one establishing through routes and that it was void because the Commission had not made the prerequisite finding that the routes were necessary in the public interest. In answer to this the court said, at pages 666, 667:

> * * * Such a finding is essential to the validity of an order under section 15 (3). But the order here in question was not sought or made under section 15 (3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. * * * The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. It did not order joint rates. And no question of divisions was before the Commission. The order was sought and made under section 1 and section 3. Section 15 (3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law.

And, finally, it is in any event settled that paragraph (4) of Section 15, which is by its express terms only a restriction upon the Commission's authority to require carriers to establish through routes, was not intended to operate as an exception to the Commission's all-important powers in respect of rates. *A., T. & S. F. Ry.* v. *U. S.*, 279 U.S. 768, involved facts as follows: Carriers serving western grain origins and having their own lines through Kansas City and beyond to the Gulf ports filed proposed proportional rates to Kansas City higher than their local rates, which were to apply on grain stopped in transit, if, after transit the outbound shipment to the ports was given to other carriers rather than to them. The Commission canceled the rates because unreasonable for the service performed to Kansas City. One of the carriers' contentions was that the Commission's order contravened the provisions of paragraph (4) of Section 15, because it prevented them from so adjusting their rates as to preserve to themselves the long haul of traffic originating on their line. Answering this contention the court said, at pages 776, 777:

> The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint

rates was not conferred until 1906. Act of June 29, 1906, c. 3591, section 4, 34 Stat. 584. There is not in that Act as amended, see *United States* v. *American Express Co.*, 265 U. S. 425, 430, note 2, or in any decision of this Court construing it; or in any of the decisions of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. Compare *Nashville, Chattanooga & St. Louis Ry. C.* v. *Tennessee*, 262 U. S. 318, 323.

VII. While regulation under the commerce clause of the Constitution of railroad rates to ports of the United States may affect the ports of one State more than those of another, that is not the giving of preference within the meaning of the clause of the Constitution that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

Certain of the appellants make the contention that the prescription by the Commission of differentials as between rates to the Texas ports and those to New Orleans is invalid because of clause 5, section 9, Article I of the Constitution, which reads as follows:

> No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter or clear or pay duties in another.

The Commission's order is for removal of preference of the Louisiana ports. That it did not, instead, give a preference to ports of Texas seems beyond dispute. From origins, not more than 25 per cent more distant from New Orleans than Galveston, New Orleans is allowed parity of rates. Only for differences in distance exceeding that percentage are the moderate rate differentials required. This would not appear to give a preference to the port of New Orleans, either in fact or in law. And, moreover, the "port preference clause" of the Constitution can not be given the construction attributed to it by appellants.

It has long been settled that regulation of commerce under the "commerce clause" of the Constitution, which may have the incidental result of affecting the ports of one state more than those of another, is not the giving of a preference to the ports of one state over those of another within the meaning of the prohibition in the Constitution here invoked by appellants.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, this court held that an act of Congress, declaring a bridge over the Ohio River at Wheeling to be a lawful structure and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce. In answer to the contention

that the bridge would interrupt and delay steamboats at Wheeling, and that that "necessarily would have the effect to stop the trade and business at Wheeling," thereby virtually operating to give a preference to this port over that of Pittsburgh, the Court said at pages 433, 434:

> * * * Conceding all this to be true, a majority of the court are of opinion that the act of congress is not inconsistent with the clause of the constitution referred to—in other words, that is not giving a preference to the ports of one State over those of another, within the true meaning of that provision. There are many acts of congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted power of congress conferred by the constitution, is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring

> the power would be sacrificed to the subordinate consequences resulting from its exercise.

In *South Carolina* v. *Georgia et al.*, 93 U. S. 4, the facts, as here pertinent, were that the Savannah River dividing the States of Georgia and South Carolina, is separated into two channels by an island just above the City of Savannah. In connection with work undertaken pursuant to appropriations made by Congress for the purpose of improving the harbor at Savannah there was built a crib or dam diverting water from the North channel, to the end of increasing the flow of the south channel and the depth of the water at Savannah. One of the contentions of South Carolina was that this contravened the clause of the Constitution here under consideration. At page 13 the court, referring to *Pennsylvania* v. *Wheeling & Belmont Bridge Co., supra,* said:

> * * * The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the Constitution.

In *Armour Packing Co.* v. *United States,* 209 U. S. 56, involving a prosecution under the Elkins Act on account of the receiving of rebates or concessions from published rates, it was, among other things, contended that the Elkins Act violated the

clause of the Constitution, here under consideration, because "it gives a distinct preference to those ports which are reached by water as against those which are reached by land." At page 80 the Court said:

> * * * It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another can not be construed as a violation of this constitutional provision. *South Carolina* v. *Georgia,* 93 U. S. 4, 13; *Pennsylvania* v. *Wheeling & Belmont Bridge Company,* 18 How, 421, 433.

CONCLUSION

The decree of the lower court denying the prayers for injunction and dismissing the petitions for want of equity should be affirmed.

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